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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1905.

No. ~~283~~ 39.

THE UNITED STATES, FOR THE USE AND BENEFIT OF DANIEL H. HILL AND HOWARD H. HILL, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF N. D. HILL & SONS, PLAINTIFFS IN ERROR,

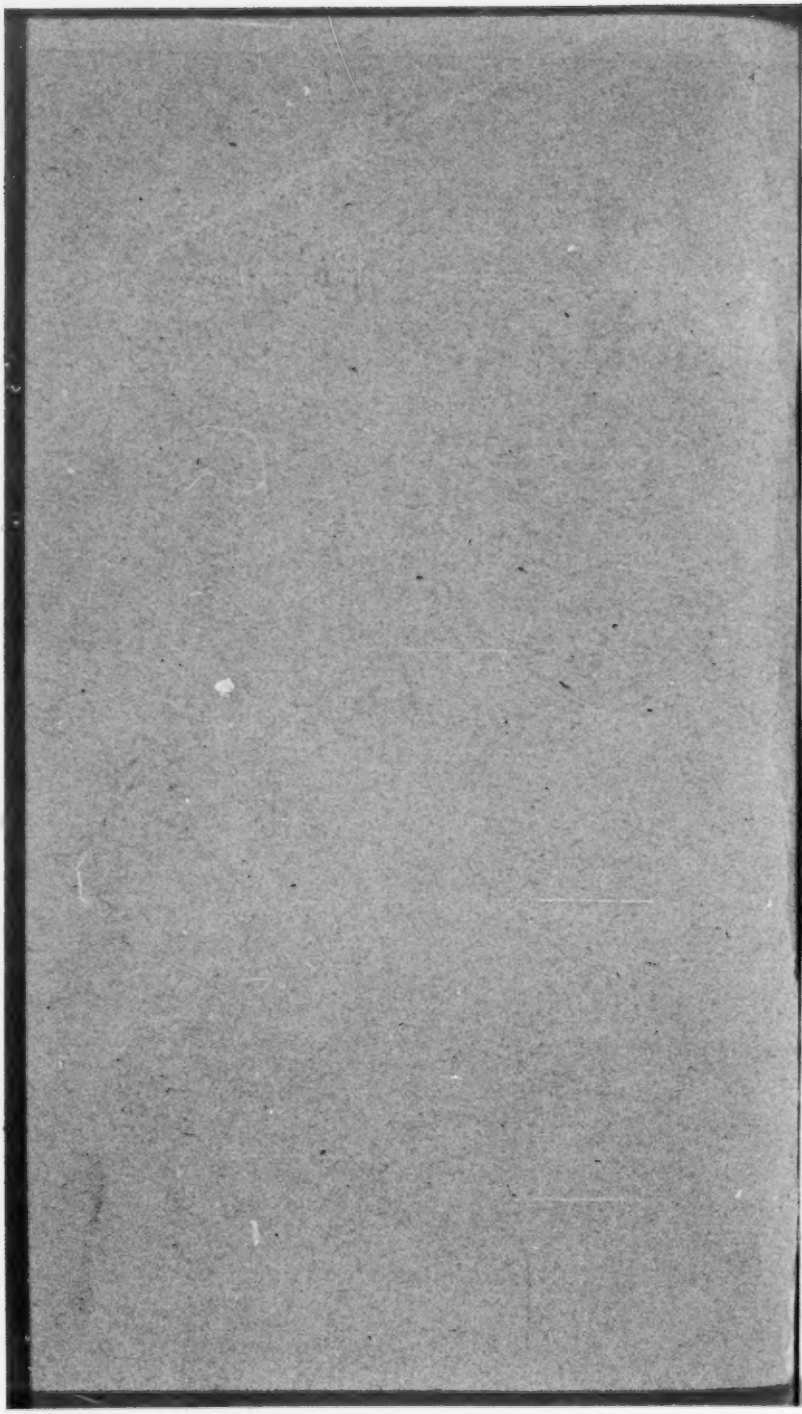
vs.

THE AMERICAN SURETY COMPANY OF NEW YORK.

IN ERROR TO THE SUPERIOR COURT OF KING COUNTY, STATE OF WASHINGTON.

FILED MAY 31, 1904.

(19,382.)



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OCTOBER TERM, 1904.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 14, 1905.

a UNITED STATES OF AMERICA, for the Use and Benefit of Daniel H. Hill and Howard H. Hill, Co-partners, Doing Business under the Firm Name of N. D. Hill & Sons, Plaintiff-Appellant,
vs.
THE AMERICAN SURETY COMPANY, a Corporation, Defendant-Respondent.
No. 40679.

Appeal to the Supreme Court of the United States from the Superior Court of King County, State of Washington.

1 In the Superior Court of the State of Washington for King County.

THE UNITED STATES OF AMERICA, for the Use and Benefit of Daniel H. Hill and Howard H. Hill, Co-partners, Doing Business under the Firm Name of N. D. Hill and Sons, Plaintiff,
versus
THE AMERICAN SURETY COMPANY, a Corporation, Defendant.
No. —. Complaint.

The plaintiff complains and for a cause of action alleges as follows:

1.

That during all the times herein mentioned, the said Daniel H. Hill and Howard H. Hill were and still are co-partners doing business under the firm name of N. D. Hill and Sons, in the city of Port Townsend, and county of Jefferson, in the State of Washington.

2.

That during all the times herein mentioned, the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and duly authorized to do a general insurance and bonding business in the State of Washington.

3.

That during all the times herein mentioned, the New Jersey Foundary and Machine Company was and still is a corpora-
2 tion duly organized and existing under and by virtue of the laws of the State of New Jersey; and that during all the times herein mentioned, the Richard Manufacturing Company was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania.

4.

That on the 14th day of February, 1901, the said New Jersey Foundary and Machine Company duly entered into a written contract with the United States of America, by the terms of which the said New Jersey Foundary and Machine Company agreed to construct and erect for the United States of America four observation towers for the agreed compensation of the sume of two thousand five hundred and seventy-five dollars, three of the said observation towers at Fort Flagler and one at Fort Warden, in the county of Jefferson, State of Washington; and that by the terms of said contract it was also agreed and stipulated therein as follows:

"That the said New Jersey Foundary and Machine Company shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material."

And that by the terms of said contract said work was to be completed by the said New Jersey Foundary and Mac-ine Company within seven months from the date of said contract, and that by the terms of said contract the said New Jersey Foundary and Machine Company agreed to do and perform the services, and to furnish the material therefor, in the prosecution of said work, including the scraping and painting hereinafter mentioned and done by the said Daniel H. Hill and Howard H. Hill.

3

5.

That the United States required said contract to be accompanied by the usual penal bond executed by the said New Jersey Foundary and Machine Company, and good and sufficient surety, with the additional obligation that the said New Jersey Foundary and Machine Company shall promptly make payments to all persons supplying it labor and materials in the prosecution of the said work provided for in said contract; and that in accordance with, and pursuant to said requirement, and the laws of the United States in such cases made and provided, the said New Jersey Foundary and Machine Company, as principal, and the said American Surety Company, as surety, on the said 14th day of February, 1901, duly made, executed and delivered unto the United States of America, their joint and several bond, in the penal sum of four thousand dollars, to be paid unto the United States of America, and conditioned as follows:

"Now, therefore, if the above bounden New Jersey Foundary and Machine Company shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements, in and by said contract agreed and covenanted by said New Jersey Foundary and Machine Company to be observed and performed according to the true intent and meaning of said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all

persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue."

And that on the 19th day of March, 1901, said contract
4 and bond were duly approved by the United States, and filed in the Department of War, and that thereafter the said New Jersey Foundary and Machine Company duly entered upon the performance of said contract.

6.

That thereafter, and before the 1st day of April, 1902, the said New Jersey Foundary and Machine Company duly entered into a contract with the said Richard Manufacturing Company, by the terms of which the said New Jersey Foundary and Machine Company sublet unto the said Richard Manufacturing Company, and the said Richard Manufacturing Company agreed to do, certain portions of the work provided for in said contract between the said New Jersey Foundary and Machine Company and the United States; and that thereupon the said Richard Manufacturing Company entered upon the performance of its said contract with the said New Jersey Foundary and Machine Company, which included the work and materials furnished by the said Daniel H. Hill and Howard H. Hill, hereinafter mentioned.

7.

That between the 3d day of April, 1902, and the 17th day of May, 1902, the said Daniel H. Hill and Howard H. Hill, at the special instance and request of the said Richard Manufacturing Company, scraped and painted the said four observation towers, which the said New Jersey Foundary and Machine Company by said written contract with the United States agreed to construct and erect for the United States, as aforesaid, and the said Richard Manufacturing Company promised and agreed to pay the said Daniel H. Hill and Howard H. Hill therefor the sum of two hundred and forty-six dollars and eighty cents ($246.80), but that no part thereof has been paid, excepting the sum of one hundred and five
5 dollars ($105.00), and that the sum of one hundred and forty-one dollars and eighty cents ($141.80) with interest thereon at the legal rate of six per cent. per annum from the 17th day of May, 1902, is still wholly due and unpaid, and owing to said Daniel H. Hill and Howard H. Hill, and that payment thereof has been duly demanded by them and has been refused.

8.

That on the 11th day of August, 1903, the said Daniel H. Hill and Howard H. Hill duly made an affidavit of their said claim and demand as provided by the statutes of the United States, and pre-

sented the same to the honorable Secretary of War of the United States, and demanded of him and procured from him a duly certified copy of the said original contract and bond from the said New Jersey Foundary and Machine Company to the United States, for the purpose of this suit, and that the said Daniel H. Hill and Howard H. Hill are now in the possession of the same and bring this action thereon in the name of the United States but for their use and benefit, as provided by the statutes of the United States.

9.

That the said New Jersey Foundary and Machine Company, the Richard Manufacturing Company and the United States accepted the said scraping and painting done by the said Daniel H. Hill and Howard H. Hill on said four observation towers, under the said original written contract and bond between the said New Jersey Foundary and Machine Company with the United States, as aforesaid, and in the fulfillment of said original written contract and bond, and that the said scraping and painting done and performed by the said Daniel H. Hill and Howard H. Hill was necessary in the prosecution of said work required by said original written contract, and included therein.

6

10.

That said bond hereinbefore mentioned was duly executed and delivered by the said New Jersey Foundary and Machine Company under its corporate seal, and by the said American Surety Company under its corporate seal, on the 14th day of February, 1901, to the United States, as aforesaid, and said scraping and painting done and performed by the said Daniel H. Hill and Howard H. Hill, as aforesaid, was and is of the reasonable value and worth of the said sum of two hundred and forty-six dollars and eighty cents ($246.80).

Wherefore plaintiff demands judgment for the use and benefit of the said Daniel H. Hill and Howard H. Hill, against the said defendant, The American Surety Company, for the full sum of one hundred and forty-one dollars and eighty cents ($141.80), with interest thereon from the 17th day of May, 1902, until paid, at the legal rate of six per cent. per annum, and for the plaintiff's costs and disbursements in this action, and for such other and further relief as it may be entitled to receive.

A. W. BUDDRESS,
Attorney for Plaintiff.

P. O. address: Port Townsend, county of Jefferson, State of Washington.

7 STATE OF WASHINGTON, }
County of Jefferson, } ss:

Howard H. Hill, being first duly sworn on oath deposes and says: That he is one of the persons named in the before entitled cause and

for whose use and benefit the foregoing action is brought; that he has heard read the foregoing complaint, knows the contents thereof, and believes the same to be true.

HOWARD H. HILL.

Subscribed and sworn to before me this 7th day of October, A. D. 1903.

A. W. BUDDRESS,
Notary Public for State of Washington,
Residing at Port Townsend, Wash'n.

(Endorsed:) No. 40679. Filed Oct. 10, 1903. C. A. Koepfli, clerk.

8 In the Superior Court in the State of Washington for the County of King.

THE UNITED STATES OF AMERICA, for the Use and Benefit of Daniel H. Hill and Howard H. Hill, Copartners, Doing Business under the Firm Name of N. D. Hill & Sons, Plaintiff,
v.
AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Defendant.
} No. 40679. Demurrer.

Comes now The American Surety Company of New York, the defendant in the above entitled action and demurs to the complaint of the plaintiff herein and for cause of demurrer states:

That said complaint does not state facts sufficient to constitute a cause of action.

HASTINGS & STEDMAN,
Attorneys for Defendant.

Filed May 13, 1904, as of Apr. 6, 1904.
C. A. KOEPFLI, Clerk.

9 In the Superior Court of the State of Washington for the County of King.

THE UNITED STATES OF AMERICA, for the Use and Benefit of Daniel H. Hill and Howard H. Hill, Copartners, Doing Business under the Firm Name of N. D. Hill & Sons, Plaintiff,
v.
AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Defendant.
} No. 40679.

This cause having heretofore been presented to the court upon the demurrer of the defendant to plaintiff's complaint and the court

having listened to the argument of counsel for the respective parties and having taken said cause under advisement and the court being now duly advised in the premises it is here and now adjudged that the said demurrer be and it is sustained. To which ruling of the court the plaintiff excepts and its exception is hereby allowed.

Done in open court this 6th day of April, A. D. 1904.

ARTHUR E. GRIFFIN, Judge.

Filed Apr. 6, 1904.

C. A. KOEPFLI, Clerk.

10 In the Superior Court of the State of Washington for the County of King.

THE UNITED STATES OF AMERICA, for the Use and Benefit of Daniel H. Hill and Howard H. Hill, Co-partners, Doing Business under the Firm Name of N. H. Hill & Sons, Plaintiff,
v.
AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Defendant. } No. 40679.

This cause coming regularly on to be heard this 28th day of April, A. D. 1904, upon the application of the defendant herein for judgment of dismissal, and it appearing to the court that on to wit: the 4th day of April, A. D. 1904, by order of court the defendant's demurrer to the plaintiff's complaint was sustained, and it further appearing that said plaintiff has elected to stand on its said complaint and refuses to plead further,

Now, therefore, on motion of said defendant it is hereby ordered and adjudged that the plaintiff's complaint be and it hereby is dismissed and that the defendant recover of and from the plaintiff its costs and disbursements herein taxed in the sum of $15.00 and that execution issue therefor.

Done in open court this 28th day of April, A. D. 1904.

Plaintiff duly excepts and its exception is allowed.

ARTHUR E. GRIFFIN, Judge.

O. K. as to form of order and subject to objection and exception to ruling and judgment.

A. W. BUDDRESS.

Filed Apr. 28 1904

C. A. KOEPFLI, Clerk.

11 In the Superior Court of the State of Washington for King County.

THE UNITED STATES OF AMERICA, for the Use and Benefit of Daniel H. Hill and Howard H. Hill, Co-partners, Doing Business under the Firm Name of N. D. Hill and Sons, Plaintiff, *vs.* AMERICAN SURETY COMPANY, a Corporation, Defendant.	No. 40679. Assignment of Errors.

The above named plaintiff, by *their* undersigned attorney, allege that, in the record and proceedings herein in this court, there is manifest error in this to-wit:

1. In sustaining the defendant's demurrer herein filed to plaintiff's complaint.

2. In rendering judgment "that the plaintiff's complaint be and is dismissed and that the defendant recover of and from the plaintiff its costs and disbursements herein and that execution issue therefor."

3. In the ruling of this court that the plaintiff's complaint herein filed does not state facts sufficient to constitute a cause of action against the defendant.

4. In the ruling of the court that under the statutes of the United States, that the defendant is not liable to the plaintiff, nor to the said Daniel H. Hill and Howard H. Hill, nor to any or either of them, for any of the services or material furnished by the said

12 Daniel H. Hill and Howard H. Hill, or either of them, as set forth in plaintiff's complaint herein filed, nor upon said complaint.

Wherefore, the plaintiff prays, that the foregoing assignment of errors be entered upon the records of this cause and court, and that upon the hearing of the writ of error that the judgment in this cause against the plaintiff be, in all things, reversed, annulled and set aside, with a direction to enter a judgment in favor of the plaintiff, for the use and benefit of the said Daniel H. Hill and Howard H. Hill, in accordance with the prayer of plaintiff's complaint herein filed.

[SEAL.]

A. W. BUDDRESS,
Attorney for Plaintiff.

The foregoing assignment of errors is examined and allowed.
ARTHUR E. GRIFFIN, Judge.

Copy of within assignment of errors received, and service of same acknowledged this 11th day of May 1904.
HASTINGS & STEDMAN,
Attorneys for Defendant.

Filed May 11, 1904.
C. A. KOEPFLI, Clerk.

13 In the Superior Court of the State of Washington for King County.

THE UNITED STATES, for the Use and Benefit of Daniel H. Hill and Howard H. Hill, Co-partners, Doing Business under the Firm Name of N. D. Hill and Sons, Plaintiff, vs. AMERICAN SURETY COMPANY OF NEW York, a Corporation, Defendant.	No. 40679. Petition for a Writ of Error.

To the Honorable Arthur E. Griffin, judge of said court:

The above named plaintiff, by *their* undersigned attorney, complain- that in the record and proceedings had in the before entitled cause, in the order of this court sustaining the defendant's demurrer herein filed to plaintiff's complaint, and in the judgment rendered in this cause and court on the 28th day of April, 1904, and filed and entered on the 28th day of April, 1904, manifest error hath happened to the great damage of the plaintiff, and to the said Daniel H. Hill and Howard H. Hill, and to each of them; that the plaintiff has filed herewith *their* assignment of errors committed by said court in said cause, and intended to be urged by your petitioner, as plaintiff in error, in the prosecution of this suit in error against The American Surety Company of New —, as defendant in error.

Wherefore, plaintiff prays that *their* appeal be allowed, and that a writ of error from the Supreme Court of the United States
14 to our said superior court issue to correct the said errors complained of, and to reverse and annul said judgment according to law.

A. W. BUDDRESS,
Attorney for Plaintiff.

Dated this 11th day of May, 1904.

The foregoing petition for a writ of error from the Supreme Court of the United States to our said superior court is hereby granted. Let a writ of error issue as prayed for in said foregoing petition.

Dated this 11th day of May, 1904.

ARTHUR E. GRIFFIN,
[SEAL.] Presiding Judge of said Superior Court of the State of Washington for the County of King and the Judge Who Rendered the Judgment Complained of in the Foregoing Petition.

Copy of within petition for a writ of error and order allowing same, received, and service of same acknowledged this 11th day of May 1904.

HASTINGS & STEDMAN,
Attorneys for Defendant.

Filed May 11 1904
C. A. KOEPFLI, Clerk.

15 Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to American Surety Company of New York, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held on Monday the 11th day of July, 1904, at the city of Washington, District of Columbia, United States of America, pursuant to a writ of error from the said Supreme Court of the United States to the superior court of the State of Washington for King county, filed in the clerk's office of said superior court of the State of Washington for King county at the city of Seattle, State of Washington, wherein The United States of America for the use and benefit of Daniel H. Hill and Howard H. Hill, co-partners doing business under the firm name of N. D. Hill and Sons, *are* plaintiff in error, and you the said American Surety Company of New York, a corporation, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of May, in the year of our Lord one thousand nine hundred and four.

ARTHUR E. GRIFFIN,
[SEAL.] Presiding Judge of the Superior Court of the State of Washington for King County and the Judge Who Rendered the Judgment to be Reviewed by said Writ of Error.

16 Copy of the foregoing and within citation received and service of the same is hereby acknowledged this 11th day of May, 1904.

HASTINGS & STEDMAN,
Attorneys for said American Surety Company of New York, the Defendant in Error.

(Endorsed:) No. 40679. Filed May 11 1904 C. A. Koepfli, clerk.

17 Know all men by these presents, that we, Daniel H. Hill and Howard H. Hill, as principals, and E. J. Klinger and Nath. D. Hill as sureties, all of Port Townsend, Washington, are held and firmly bound unto American Surety Company of New York, a corporation, in the penal sum of two hundred and fifty dollars, for which payment well and truly to be made unto the said American Surety Company of New York, we bind ourselves, our and each of

our heirs, executors, and administrators, jointly and severally and firmly by these presents.

Sealed with our seals, and dated this 11th day of May, A. D., 1904.

Now the condition of the foregoing obligation is such, that whereas the superior court of the State of Washington for King county, wherein The United States of America for the use and benefit of the said Daniel H. Hill and Howard H. Hill, copartners doing business under the firm name of N. D. Hill and Sons, is plaintiff, and said American Surety Company of New York, is defendant, did on the 28th day of April, 1904, render a judgment that said action be dismissed and that the said defendant do have and recover of and from the said plaintiff its costs and disbursements in said action, which judgment was rendered and signed by the Honorable Arthur E. Griffin as judge of said superior court, and filed on the 28th day of April, 1904; and whereas, the said plaintiff has duly applied for and obtained a writ of error from the Supreme Court of the United States to said superior court in said cause to reverse said judgment; and whereas, a citation directed to the American Surety Company of New York, a corporation, citing and admonishing it to be and appear in the Supreme Court of the United States at the city of
18 Washington, in the District of Columbia, on the 11th day of July, A. D., 1904, which citation has been duly served as provided by law;

Now, therefore, if the said plaintiff and the said principals shall prosecute their said writ of error to effect, and if they fail to make good their said writ of error and plea, shall answer all the costs which may be adjudged against them, or any of them, then this obligation to be void, but otherwise to be and remain in full force and effect.

DANIEL H. HILL. [SEAL.]
HOWARD H. HILL. [SEAL.]
EMIL J. KLINGER. [SEAL.]
NATH. D. HILL. [SEAL.]

Signed, sealed and delivered in the presence of,
J. M. RALSTON.
A. W. BUDDRESS.

19 STATE OF WASHINGTON, } ss:
County of Jefferson, }

E. J. Klinger and Nath. D. Hill being first duly sworn each one on oath for himself says: That he is one of the sureties in the foregoing bond, a resident and freeholder of the county of Jefferson, State of Washington, and that he is worth the sum of five hundred dollars over and above all of his debts and liabilities in property situated in said State, which is not by law exempt from execution or sale.

EMIL J. KLINGER.
NATH. D. HILL.

Subscribed and sworn to before me this 11th day of May, A. D. 1904.

[SEAL.] A. W. BUDDRESS,
Notary Public for State of Washington,
Residing at Port Townsend, Wash'n.

The foregoing bond is hereby approved this 11th day of May, A. D. 1904.

ARTHUR E. GRIFFIN,
Presiding Judge of the Superior Court of the State of Washington for King County and the Judge Who Allowed the Writ of Error and Who Signed the Citation Mentioned in said Bond.

Copy of the foregoing bond received and service thereof acknowledged this 11th day of May, A. D. 1904.

HASTINGS & STEDMAN,
Attorneys for Defendant in Error.

(Endorsed:) No. 40679. Filed May 11 1904. C. A. Koepfli, clerk.

20 In the Superior Court of the State of Washington for the County of King.

THE UNITED STATES OF AMERICA, for the Use and Benefit of Daniel H. Hill and Howard H. Hill, Copartners, Doing Business under the Firm Name of N. D. Hill & Sons, Plaintiff,
vs.
THE AMERICAN SURETY COMPANY, a Corporation, Defendant. } No. 40679.

UNITED STATES OF AMERICA, State of Washington, County of King, } ss:

I, C. A. Koepfli, clerk of the superior court of the State of Washington for King county, do hereby certify that the foregoing twenty-one typewritten pages, numbered from one to nineteen both inclusive, to be full, true and correct copies of the record, papers and proceedings in the above and therein entitled cause, as such papers and proceedings are now on file and of record in said cause in the office of the clerk of said superior court at Seattle, State of Washington, and that the same constitute the return to the annexed writ of error. I further certify that the cost of preparing and certifying said return to the writ of error is the sum of $5.00, and that the same has been paid to me by A. W. Buddress, Esq., the attorney for the
21 plaintiff in said cause in said superior court.

In witness whereof, I have hereunto set my hand and

affixed the seal of our said superior court, this 20 day of May, A. D. 1904.

[Seal of the Superior Court of King County, Washington.]

C. A. KOEPFLI,
Clerk of the Superior Court of the State
of Washington for King County.

22 Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable Arthur E. Griffin, presiding judge of the superior court of the State of Washington for King county, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said superior court of the State of Washington for King county, before you, being the highest court of law and equity of said State in which a decision could be had in said suit, between The United States of America for the use and benefit of Daniel H. Hill and Howard H. Hill, co-partners doing business under the firm name of N. D. Hill and Sons, plaintiff in error, and American Surety Company of New York, a corporation, defendant in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right and privilege specially set up and claimed under such statute of the United States, manifest error hath happened to the great damage of the said plaintiff in error as by *their* complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, District of Columbia, United States of America, together with this writ, so that you have the same at said city of Washington, on the 11th day of July, A. D. 1904, in said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United
23 States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, the 11th day of May, A. D. 1904.

{Seal United States Circuit Court, District of Washington, Northern Division.}

A. REEVES AYRES,
Clerk of the United States Circuit Court
for the District of Washington,
By R. M. HOPKINS,
Deputy Clerk of said Court.

Allowed by:

ARTHUR E. GRIFFIN,
Presiding Judge of the Superior Court of the State of Washington for King County and the Judge Who Rendered the Judgment to be Reversed by said Writ of Error.

24 Copy of the foregoing writ of error received and service thereof acknowledged this 11th day of May, A. D. 1904.

HASTINGS & STEDMAN,
Attorneys for Defendant in Error.

25 [Endorsed:] No. 40679. Writ of error. United States of America for the use and benefit of Daniel H. Hill and Howard H. Hill, plaintiff in error, *vs.* American Surety Company of New York, defendant in error. Filed May 11, 1904. C. A. Koepfli, clerk. B.

Endorsed on cover: File No. 19,382. Washington superior court, King county. Term No. 282. The United States, for the use and benefit of Daniel H. Hill and Howard H. Hill, co-partners, doing business under the firm name of N. D. Hill & Sons, plaintiffs in error, *vs.* The American Surety Company of New York. Filed May 31, 1904. File No. 19,382.

FILE COPY.

FILED
MAR 29 1905
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF, DANIEL H. HILL AND HOWARD H. HILL, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF N. D. HILL & SONS,

Plaintiff in Error,

vs.

AMERICAN SURETY COMPANY OF NEW YORK,

Defendant in Error.

No. 392.

Writ of Error to the Superior Court of the State of Washington, for King County.

BRIEF OF PLAINTIFF IN ERROR

ALBERT W. BUDDRESS,
Attorney and Counsel for Plaintiff in Error.
P. O. address, Port Townsend, Wash.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF, DANIEL H. HILL AND HOWARD H. HILL, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF N. D. HILL & SONS,

Plaintiff in Error,

VS.

AMERICAN SURETY COMPANY OF NEW YORK,

Defendant in Error.

No. 282

Writ of Error to the Superior Court of the State of Washington, for King County.

BRIEF OF PLAINTIFF IN ERROR

Statement of the Facts.

This action was brought in the name of the United States by Daniel H. Hill and Howard H. Hill, in the Superior Court of the State of Washington, for King County, to recover from the American Surety Com-

pany on its construction bond to the United States, the balance of $141.80, with interest and costs, for painting and scraping four observation towers at Forts Flager and Worden, in the State of Washington. The Superior Court of the State sustained a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and dismissed the action, and that judgment of dismissal Daniel H. Hill and Howard H. Hill now seek to reverse by a writ of error from this Court directly to the Superior Court of the State of Washington for King County, that being the highest Court of the state in which a decision could be had under the state constitution.

The complaint alleges in substance: That in 1901, the New Jersey Foundry and Machine Company, a corporation of the State of New Jersey, duly entered into a written contract with the United States for the construction of three observation towers at Fort Flagler and one observation tower at Fort Worden, for the government, in the State of Washington, for the sum of $2,575.00, "and that by the terms of said contract it was also agreed and stipulated therein as follows:

"'*That the said New Jersey Foundry and Machine Company shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.*'"

That at the time of the execution and delivery of said contract, that the said New Jersey Foundry and

Machine Company, as principal, and the American Surety Company of New York, as surety, duly made, executed and delivered unto the United States their joint and several bond in the penal sum of $4,000.00, to be paid to the United States, and conditioned as follows:

"'Now, therefore, if the above bounden New Jersey Foundary and Machine Company shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements, in and by said contract agreed and covenanted by said New Jersey Foundry and Machine Company to be observed and performed according to the true intent and meaning of said contract, and shall promptly make full payments to all persons supplying it labor and materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.'"

That after the execution of said contract and bond, that the said New Jersey Foundry and Machine Company sublet a part of its contract to the Richard Manufacturing Company, a corporation of Pennsylvania, which part so sublet included the work and material of Daniel and Howard Hill. That in April and May, 1902, the said Daniel and Howard Hill, at the special instance and request of the sub-contractor, The Richard Manufacturing Company, scraped and painted the said four observation towers which the New Jersey Foundry and Machine Company agreed by said written contract to construct for the government, at the agreed compensation of $246.80, no part of which

is paid excepting $105.00, and that the balance of $141.80, is still due and unpaid.

"That the said New Jersey Foundry and Machine Company, the Richard Manufacturing Company, and the United States, accepted the said scraping and painting done by the said Daniel H. Hill and Howard H. Hill on said four observation towers, under said original written contract and bond between the said New Jersey Foundry and Machine Company with the United States, as aforesaid, and in the fulfillment of said original written contract and bond, and that said scraping and painting done and performed by said Daniel H. Hill and Howard H. Hill was necessary in the prosecution of said work required by said original contract, and included therein."

To that complaint the defendant surety company demurred on the ground that the same does not state facts sufficient to constitute a cause of action, which demurrer the State Superior Court sustained, and then dismissed the action, *on the sole ground that the Hills could not recover on the bond executed in pursuance of the Act of Congress of Aug. 13, 1894, for the reason that they had furnished the labor to a sub-contractor of the original contractor for the construction of the observation towers for the government*, and that under that Act of Congress and bond, the surety is not liable for any labor or materials furnished to any sub-contractor.

The plaintiff duly excepted to that ruling of the Court, and now seeks to reverse that judgment and ruling by this writ of error. The lower Court did not

file any written opinion.

The following assignment of errors were filed in the lower Court:

"1. In sustaining defendant's demurrer herein filed to plaintiff's complaint.

"2. In rendering judgment 'that plaintiff's complaint be and is dismissed and the defendant recover of and from the plaintiff its costs and disbursements herein and that execution issue therefor.'

"3. In the ruling of this Court that the plaintiff's complaint herein filed does not state facts sufficient to constitute a cause of action against the defendant.

"4. In the ruling of the Court that under the statutes of the United States, that the defendant is not liable to the plaintiff, nor to the said Daniel H. Hill and Howard H. Hill, nor to any or either of them, for any of the services or material furnished by the said Daniel H. Hill and Howard H. Hill, or either of them, as set forth in plaintiff's complaint herein filed, nor upon said complaint."

The lower Court made the following endorsement on the assignment of errors:

"The foregoing assignment of errors is examined and allowed."

These assignment of errors raise but one question for the decision of this Court on this writ of error,

and that is, whether or not a person who furnishes labor or material to a *sub-contractor* is protected by a bond given under that Act of Congress by the original contractor? The lower Court held not, and if that ruling is correct this case must be affirmed, but otherwise reversed.

Under the provisions of the State Constitution and the decisions of the State Supreme Court, the judgment of the Superior Court of the State of Washington for King County which is sought to be reviewed was final, and there was no appeal to the State Supreme Court, nor any other mode of review, for the reason that the amount in controversy here does not exceed the sum of $200, but is only $141.80.

State ex rel. Dudley v Dagget, 28 Wash. 1;

Bleecker v Satsop etc. R. Co., 3 Wash. 77;

State v Fisher, 4 Wash. 382;

Lotz v Mason County, 6 Wash. 166;

State v Superior Court, 8 Wash. 271;

State v Superior Court, 22 Wash. 496;

State v Superior Court, 24 Wash. 605.

"The amount in controversy," is the amount sued for as shown by the pleadings." *Bleecker v Satsop etc. R. Co., 3 Wash. 77; Schreimer v Emel, 26 Wash. 555.*

Art. 4, Sec. 4, of the State Constitution provides:

"The Supreme Court shall have original jurisdic-

tion in *habeas corpus* and *quo warranto* and mandamus, as to all state officers, and appellate jurisdiction in all actions and proceedings, except that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property, does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute."

But the appellate jurisdiction of this Court to review the judgments of the state courts does not depend upon the amount in controversy.

Buel v Van Ness, 8 Wheat. 312;
Gulf etc. Ry. Co. v Ellis, 165 U. S. 150;
Murdock v Mayor of Memphis, 20 Wall. 590;
2 Foster's Fed. Prac. (3d ed.) §§ 500 and 504;
Revised Statutes of U. S., § 709.

And writ of error from this Court will lie to the highest court of the state in which a decision could be had.

Missouri etc. Ry. Co. v Elliot, 184 U. S. 530;
Clark v Pennsylvania, 128 U. S. 395;
Fisher v Corrico, 122 U. S. 522;
Gregory v McVeigh, 23 Wall. 294;
Downham v Alexandria, 9 Wall. 659;
2 Foster's Fed. Prac. (3d ed.) §§ 500 and 504;
Revised Statutes of U. S. § 709.

While the amount in controversy in this case is small, the question involved on this appeal is very important, as the decision of the lower Court practically nullifies the Act of Congress passed for the protection of persons furnishing labor and material in the construction of public works. As observed by this Court in Gulf etc. Ry. Co. v Ellis, 165 U. S. 150:

"The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved."

The bond was given in pursuance of the Act of August 13, 1894 (28 Statutes at Large, 278, Chapter 280, U. S. Compiled Statutes, 1901, p. 2523). The Act is entitled and reads as follows:

"An Act for the protection of persons furnishing materials and labor for the construction of Public Works."

"Be it enacted," etc., "that hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations *that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract;* and any person or persons making ap-

plication therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense."

The bond, it will be seen, is a joint and several one, and the surety alone was sued, because both the principal on the bond (the original contractor) and its sub-contractor, were foreign corporations and non-residents of the state. The principal, or original contractor, preferred to make its money out of its contract with the government *by sub-letting the entire work*, and as soon as the work was completed, both the contractor and sub-contractor immediately withdrew all of their officers and agents from the state. Neither one left any property therein, and, consequently, our only recourse was a suit on the bond against the surety company, who had an office and agent in the state. And it will, therefore, be seen that this suit against the surety company on the bond is about our only remedy, and if it does not lie under that Act of Congress, we would practically be without any remedy at

all. But we think that the Act of Congress and bond were intended to cover just such cases, and to prevent such a miscarriage of justice. We do not think that the original contractor can so easily kill the effects of that statute, and avoid all liability on the bond *by merely sub-letting all of its work.*

"Indeed our observations convince us that, of the two classes of laborers, the employes of *sub-contractors* stand most in need of the protection of the statute." *Redmond v Galena etc. R. Co., 39 Wis. 426.*

This precise question, under that Act of Congress, has never been decided by this, nor by any other appellate Court, excepting in Mullin v U. S. 48 C. C. A. 677, where appellant's contention was squarely sustained. The lower Court based its judgment upon the District Court decision in U. S. v Farley, 91 Fed. 474, and refused to follow any of the State decisions on similar State Statutes. Counsel for defendant also relied upon U. S. v Simon, 38 C. C. A. 659, and these last two were the only cases cited by counsel below, and we think that they are the only two cases that can be found in the State and Federal Courts which even inferentially tend to sustain the judgment of the lower Court.

In U. S. v Farley, 91 Fed. 474, the District Court did not sustain a demurrer to the complaint, as the lower Court did in this case, but there the Court came to the conclusion, after hearing all the evidence, that, since the original contractor had fully paid his subcontractor for all the material used, he should not be

required to pay for the same again to the person who furnished the sub-contractor. But in this case it was not shown that the original contractor had paid anything to his sub-contractor for the services sued for, but even if it had been, it would make no difference, because the original contractor should have taken, and probably did take, an indemnity bond from its sub-contractor.

The controlling question, therefore, in this case is, did Congress by that Act intend to protect only those persons who should furnish labor and material "*directly*" to the original contractor on public works, or all the persons furnishing labor and material in the construction of any public work, whether furnished "directly" to the original contractor, or "indirectly" to him through his sub-contractor? Or in other words, is the liability to be tested by the fact that the labor and material has been furnished "directly" to the original contractor, or by the fact *that such labor and material contributed to the construction of the public work?*

We think that since the remedy has been given on the theory that the contractor should pay the persons *whose labor and material contributed to the construction of the contractor's building*—that the contractor is bound to pay for all such labor and material which contributed to the construction of his building, whether the same were furnished "directly" to him, or "indirectly" to him through his sub-contractor. In short, we think that the liability depends upon the *benefit*, in-

stead of upon any *particular* person's request for such benefit.

The principal and surety have received the *benefit* of our services, without which they could not have completed their contract with the government, *then why should they not also bear the burden?* As said by the Supreme Court of Minnesota in Sepp v McCann, 47 Minn. 364: "As between the original contractor and the government, the work done and material furnished would be his whether he did or furnished them directly, *or caused them to be done or furnished through his sub-contractors.*" See Mullin v U. S., 48 C. C. A. 677.

That Act does not say that the contractor shall promptly pay all the persons "*employed*" by him, but on the contrary, it says that the contractor shall promptly pay all persons "*supplying*" him with labor and material in the construction of his work. The liability is made to depend upon the fact that the contractor has been "*supplied*" with the labor and material, without which he could not have completed his public work, without regard to the fact of whether he "*requested*" the same directly himself, or indirectly through someone else for him. There is a difference between being "supplied" with such labor and "employing" such labor. A person may be "supplied" with such labor without his immediate request for the same. So the contractor in this case was "supplied" with our services, and received the full benefit of the same, whether it directly "requested" the same itself or not.

This contention is greatly strengthened by the subsequent part of the same section of that Act which says: "And *any person or persons* making application therefor, and furnishing affidavit to the department under the direction of which said work is being done or has been prosecuted, *that labor or materials for the prosecution of such work has been supplied by him or them,* and payment for which has not been made, shall be furnished with a certified copy of such contract and bond, *upon which said person or persons supplying such labor and materials shall have a right of action.*"

Now when we read the first part of that section in the light of the second part, we think that there can be little doubt but that a person furnishing labor or material to a sub-contractor is within the protection of that Act, because stripped of its verbage that section says: "*Any person 'supplying' labor or material for the prosecution of such work shall have a right of action on such bond.*"

In this case, the surety company would have no just complaint, if it should be held liable for the payment of "*all*" the labor and material which were actually and necessarily used in the construction of the government observation towers, because it expressly promised to pay for "*all*" such labor and material instead of only for "*a part*" thereof. In short, in this case, the surety company is not asked to pay a cent more than it actually agreed to pay, and there certainly is no good reason for holding that it should be released from the payment of "*a part*" of the labor or

material which was actually and necessarily used in the construction of this work, when it agreed to pay for "*all.*"

In United States Fidelity & Guaranty Co. v U. S., 191 U. S. 416, this Court say:

"The guarantor is ignorant of the parties with whom his principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and it is to be assumed that the surety contracts with knowledge of this fact. Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of sixty days, or whether, after the materials are furnished, the time for payment is extended sixty days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain."

So it may be said in regard to this bond and surety: "Not knowing when or by whom the labor or material would be furnished, it can make no difference to this surety whether the same was furnished *directly* to the principal, or contractor, or *indirectly* to him through the agency of its sub-contractor."

That the principals and sureties on such bonds are liable, under similar state statutes, for labor and material furnished to sub-contractors, is well established:

Mullin v U. S., 48 C. C. A. 677;
George v Washington, etc. R. Co., 93 Me. 134;
Branin v Connecticut, etc. R. Co., 31 Vt. 214;
Kent v New York, etc. R. Co., 12 N. Y. 628;
Mundt v Sheboygan etc. R. Co., 31 Wis. 451;
Redmond v Galena etc. R. Co., 39 Wis. 426;
Mann v Corrigan, 28 Kan. 194;
Peters v St. Louis, etc. R. Co., 24 Mo., 586;
Grannahan v Hannibal, etc. R. Co. 30 Mo. 546;
French v Powell, 135 Cal. 636;
Gilmore v Westerman, 13 Wash. 390;
Abbott v Morrissette, 46 Minn. 10;
Sepp v McCann, 47 Minn. 364;
Bassett v Mills, 89 Tex. 162;
Garrison v Borio, 61 N. J. E. 236;
Ferguson v Despo, 8 Ind. App. 523 (34 N. E. 575);
23 Am. & Eng. Enc. Law, 2d ed., p. 723 (Who entitled to benefit).

And a diligent search has not revealed a case holding to the contrary. Those cases fully sustain appellant's contention in this.

An Act of the State of Wisconsin provided:

"Whenever any laborer upon any railroad in this state shall have a just claim or demand for labor performed on such railroad, against any person being contractor on such railioad *with the railroad company*, such railroad company shall be liable to pay such laborer the amount of such claim or demand."

And it was there contended, as it is here, that a person who performs labor for a sub-contractor is not within the letter or protection of the statute above quoted, for the reason, among others, that the act only specified claims for labor "against any person being a contractor on such railroad *with the railroad company.*" But the Supreme Court of Wisconsin, in a very able and exhaustive opinion in the case of *Mundt v Sheboygan, etc. Railroad Company, 31 Wis. 451,* held that the railroad company is liable for labor furnished any sub-contractor, and say:

"If the legislature had intended clearly and beyond doubt the construction for which the learned counsel contends, it is highly improbable that they would have employed language which admits of such latitude of interpretation. It is very probable, in such case, that they would have confined the remedy of the laborer within such limits as would have removed all danger of misinterpretation, which could have been very easily done by the use of a single additional word. The legislature could have said *directly* or *immediately* 'with the railroad company,' or the word *original* could have been prefixed or used before the word '*contractor*,' and no doubt could have remained. As it is, the language is doubtful, and fairly subject of double interpretation; and as such we are not only at liberty to, but must receive and consider it, and give to it such application as, within the rules and principles above stated seems most in accordance with the probable intention of the legislature.

"It being a remedial statute and its construction in

doubt, we think we are at liberty to construe it liberally for the advancement of the remedy and suppression of the mischief aimed at by the legislature. We are at liberty to take notice of the consequences which would flow from the construction contended for by counsel, and to consider that such construction would, under the system of sub-letting or subcontracting which most invariably prevails in the construction of railroads in this state, practically defeat the benign purpose which the legislature had in view in enacting the statute, and would, at the option of any and every railroad company, render the statute a dead letter and a nullity upon the statute books. We are at liberty to consider the general impoverished, degraded, ignorant and helpless condition of the class of persons whom the legislature designed to protect, and how much they do or may sometimes stand in need of just such legislative assistance. And we are furthermore at liberty to presume, and must presume, the language of the statute not being inconsistent therewith, that the legislature intended to make the remedy co-extensive with the evil; and whilst we cannot overrule or disregard the plain letter, we nevertheless may, indeed must, shape and apply, or extend or restrict, doubtful expressions in conformity with such presumed intention, and so as to uphold and give effect to it, and to suit and carry out the general policy, purview and beneficient objects of the act."

In Kent v New York Central Railroad Co., 12 N. Y. 628, it was held that a person furnishing labor or

material to a sub-contractor is within the spirit of the statute of that state similar to the Wisconsin Act, and Mr. Justice Marvin, delivering the opinion of that Court, says:

"We are to ascertain and declare the meaning of the statute. Its language, in my opinion, is sufficiently comprehensive to include the person who enters into a contract for the construction of a part of the road with one who has contracted with the company for the performance of the same work. I have not been able to perceive anything in the statute indicating a different intention in the legislature, or requiring a different construction. On the contrary, considering the whole section, and in view of the entire statute, it seems to be clear that the legislature intended to make provision for the payment of all laborers who should perform work in constructing the road for any contractor, whether such contractor entered into a contract immediately with the company, or with one who had thus contracted with the company.

"The statute is remedial, and was designed within certain, and I think, safe, limits to enable the laborer, who had not been paid by his immediate employer, to resort to the railroad company whose road he was assisting to construct. It is well known that contractors sometimes become largely indebted to the laborers employed by them, and then abscond, or fail to pay; and the design of the legislature was to furnish the laborer a new and additional remedy by en-

abling him to resort to the company.

"The railroad company can, by its contract, protect itself. It can withhold payment to its contractors until all the laborers who have been employed in the construction of that part of the road have been paid, or can provide by contract for withholding enough to pay them. Cases may undoubtedly occur where the company may be obliged to pay more than it has agreed to pay its contractors. Such cases, I apprehend, will be rare; and undoubtedly, in the judgment of the legislature, it was better that the loss should fall upon the company than upon those who by their labor constructed the road."

In the recent case of George v Washington County Railroad Company, 93 Me. 134 (44 Atl. 377), it was contended by counsel there, as here, that persons furnishing labor or material to sub-contractors are not within the letter or protection of the statute, but the Court held that they are, and say:

"We have no doubt, however, that the plaintiff is clearly within the *spirit of the statute. Any other interpretation would nullify the statute.* It is common knowledge that contracts for building railroads are nearly always taken in the first instance by construction companies or syndicates, who then let out the entire work in various divisions to sub-contractors, without themselves directly employing any laborers. The most, if not all, work of building the railroad is then done by laborers directly employed by sub-contractors. If these should be excluded from the stat-

ute by interpretation, its evident purpose would be defeated."

The same ruling was made in the State of Kansas. There the statute in substance provided that railroad companies should take bonds from their contractors engaged in the construction of any railroad, conditioned that such contractor would pay all persons furnishing them with labor and material in the construction of the railroad, and that in case any railroad should fail to take such bond, it should be liable to such persons for labor and material. There a railroad company failed to take the statutory bond, and an action was commenced against the railroad company by a person who had performed labor for a sub-contractor in the construction of a railroad, and there the *second* contention of counsel for the railroad company was that a person who performs labor for a sub-contractor is not within the protection of that act, but the Supreme Court of Kansas, in the case of *Mann v Corrigan, 28 Kan. 194*, speaking through Mr. Justice Brewer (now of this Court), refuted that *second* contention of counsel and observed:

"The other contention (*second contention*) of counsel is equally untenable. The construction claimed by counsel would practically destroy the statute. So much of the work in constructing railroads is done under sub-contracts that, if only the laborers and mechanics directly employed by the contractor are within its protection, very few would be benefited by the statute.

"If a sub-contractor's are not within its terms, it would be a very easy matter, in the building of a railroad, to avoid the statute entirely, and the evil which was designed to be remedied by this would continue the same as before. In the case last cited we said: 'The bond binds the contractor to pay for all labor done upon and materials used in the construction of the road, so far as his contract with the company calls for labor and materials, no matter how many subcontracts therefor may be made. In this respect it is a *quasi* mechanics' lien law, the lien being upon the bond instead of upon the road.' The authorities cited in that opinion supports this construction, and it gives substantial force and value to the statute.

"It may be conceded that the law is a stringent one, but the experience which has been had throughout the country in the building of railroads justifies the use of stringent means to prevent irresponsible contractors from engaging in the building of railroads, and defrauding the men whose labor and material go into the construction of the road.

"Again, the contractor by his contract engages to do the work, and he ought to see that the men who perform the labor and furnish the material are paid. If he choses to sublet, he can protect himself by taking a bond from his sub-contractor; and if he prefers to make his money out of the contract by sub-letting it, and so doing none of the work himself, it is no more than fair to the laborers, mechanics and material men, that he take suitable measures to protect them in their pay.

"In conclusion, without going further into a discussion of this question, we may remark that the statute is a remedial one, and, while not to be extended beyond the fair import of its terms, it is to be construed so that it will furnish a remedy, and protect those whom it was intended to protect."

So in this case, the original contractor did not do any part of the work but chose to sublet the entire work, and in the language of Mr. Justice Brewer, "*if it prefers to make its money out of the contract by sub-letting it, and so doing none of the work itself, it is no more than fair to the laborers, mechanics and material men, that it take suitable measures to protect them in their pay.*"

But it is needless to quote any more from our long list of state authorities at page 15 of this brief. They are not all railroad cases—some municipal indemnity bond, and others mechanics' liens indemnity bond cases. However, the reasoning of the others will not be found less persuasive than those from which we have quoted.

And again, "The rule of *strictissimi juris* is a stringent one, and is liable at times to work practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the sub-contractor, with a view of furthering the benificent object of the statute." *United States Fidelity & Guaranty Co. v U. S. 191 U. S. 416.*

So in another case this Court say: "The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty. That object could not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank." *Guarantee Co. v Mechanics' Savings, etc. Co., 183 U. S. 402.* And a remedial statute should be liberally construed with reference to the purpose of its enactment. *Bechtel v U. S., 101 U. S. 597.*

It is also the general rule that the "*intent*" of the law must prevail over the letter of the statute. In Lionberger v Rowse, 6 Wall. 468, this Court say:

"According to the words of the law the tax was not warranted, but did Congress intend that the law should have such an effect? Did it intend that the shares of national banks should escape taxation, if the state complied, so far as it had the ability to do so, with the requirements of the 41st section of the National Banking Act? In our opinion the answers to these questions must be in the negative. It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice."

"The intention of the lawmaker is the law." *Smythe v Fiske, 23 Wall. 374.* "A thing which is within the

intention of the makers of a statute, is as much within the statute, as if it were within the letter." *U. S. v Freeman, 3 How. 556.* "Whenever any words of a statute are doubtful or obscure, the intention of the legislature is resorted to, in order to find the meaning of the words." *Id.* "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter." *Smythe v Fiske, supra.*

Chief Justice Marshall said:

"The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." *Durousseau v U. S., 6 Cranch 308.*

"What is implied in a statute is as much a part of it as what is expressed." *U. S. v Hodson, 10 Wall. 395.*

"Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes though within the letter, on the principle that what is within the intention of the makers of a statute is within the statute, though not within the letter." *Mayor of Baltimore v Root, 8 Md. 95.*

We contend that "Any other construction would sacrifice the spirit and reason of the law to the mere letter; and yet, it is one of the great maxims of in-

terpretation to keep always in view the general scope, object and purpose of the law rather than its mere letter. 'He who considers merely the letter of an instrument goes but skin deep into its meaning.' *Broom's Legal Max., 611.* A rigid and literal meaning would, in many cases, defeat the very object of the statute, and would exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. . . . . And the intention is to govern, although such construction may not, in all respects, agree with the letter of the statute." *Rutledge v Crawford, 91 Cal. 523.*

"These citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed."

U. S. v Freeman, 3 How. 556;
Bell v New York, 105 N. Y. 139;
Bullock v Horn, 24 Oh. St. 420;
Tuttle v Montford, 7 Cal. 358;
Barnes v Thompson, 2 Swan (Tenn.) 313;
Sedgwick, Stat. Con. 308.

There is no doubt but that the lower Court lost sight of the "*intention*" as well as the "*object*" of this beneficent Act of Congress.

The remark of the Circuit Court of Appeals in

Jones v Great Southern Fireproof Hotel Company, 30 C. C. A., 108, in regard to lien statutes, is equally applicable to the Act now under consideration:

"Those statutes find sanction in the dictates of natural justice, and most often administer equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquired a right to compensation."

Furthermore, "where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case, the title claims a degree of notice and will have its due share of consideration." *Paterson v The Eudora, 190 U. S. 169.* "Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction."

Smythe v Fiske, 23 Wall. 374;
Mundt v Sheboygan etc. R. Co., 31 Wis. 451;
Garrison v Borio, 61 N. J. E. 236.

Now that Act is entitled: *"An act for the protection of persons furnishing materials and labor for the construction of public works."* "The scope of the Act, thus defined by its title, is quite wide enough to include all classes of persons who do work or furnish materials, whether for the original contractor or for any sub-contractor, however remote from him." *Garrison v Borio, 61 N. J. E. 236.* So the title to this Act clearly indicates the same purpose and furnishes an index to

its meaning. It shows that Congress had in mind the protection of "*all*" persons furnishing labor and material in the construction of public works, instead of only those "*few*" who should furnish directly to the original contractors, *who in this instance (as well as in most others) would number none at all*,on account of the sub-letting practice so generally in vogue. "The title aids the interpretation here given." *Mundt v Sheboygan, etc. R. Co., 31 Wis. 451.*

And again, it is true as stated by Judge Cooley: "Public property cannot be the subject of a lien, unless the statutes shall expressly so provide; it is by implication excepted from lien statutes, as much as from general tax laws, and for the same reasons." *Knapp v Swaney, 56 Mich. 345; Bates v Santa Barbara, 90 Cal. 543.* But it is also true that "*the state when engaged in the construction of public buildings, is chargeable with a moral duty to protect persons furnishing labor and material therefor.*"

Korsmeyer P. & H. Co. v McClay, 43 Neb. 649;
Knapp v Swaney, 56 Mich. 345;
Baker v Bryan, 64 Ia. 561;
Philadelphia v Stewart, 195 Pa. St. 309;
St. Louis v Von Phul, 133 Mo. 564.

And as further observed by Judge Cooley in that case: "Individuals clothed with public functions, even when constituting a corporation, are no more excused from moral obligations than when acting in a private capacity."

And it is a mistaken notion that the government is not interested in seeing that all persons furnishing labor and material in the construction of public work are paid. As observed by the Court in Baker v Bryan, 64 Ia, 561:

"They, knowing that they would be secured, would do better work and furnish better material than if they felt uncertain about their pay, cannot be doubted. And it is equally certain that the credit which the contractor would gain by the security would enable him to prosecute the work more rapidly, and with greater hope of profit. These things, it may be readily seen, would result in great benefit to the district."

And as said by the Supreme Court of Pennsylvania, in Philadelphia v Stewart, 195 Pa. St. 309, in regard to a city's interest in such a case:

"It is the right as well as the interest of the city to secure good work upon its contracts for public improvements, and there is no better policy towards that end than to satisfy honest and competent workmen that they can rely upon being paid. There being no right of mechanics' lien against public works, the work and material men are to that extent in the contractor's power as to pay, and that fact has a natural tendency to produce skimped work and inferior materials by the class of men willing to run that risk."

But while we contend that it is held, by at least the weight of authority, that persons furnishing labor or

material to sub-contractors are entitled to mechanics' liens under statutes as comprehensive as this Act of Congress (*Abbott v Morrisette, 46 Minn. 10; Parker v Bell, 7 Gray. 429; Bassett v Mills, 89 Tex. 162; Eccleston v Heating, 17 Mont. 88; Zarrs v Keck, 40 Neb. 456*)—yet the right of the plaintiffs to recover does not depend upon their right to a lien. "*The true spirit and merit of the statute is lost sight of in the contention that this remedy is a mere substitute for the remedy by lien, and when the latter does not exist, the former cannot exist.*"

Bates v Santa Barbara, 90 Cal. 543;
Kent. v New York Central R. Co., 12 N. Y. 628;
American Surety Co. v Cement Co., 110 Fed. 717;
Garrison v Borio, 61 N. J. E. 236.

And although this Court has held that a "statute giving liens to mechanics and laborers for their work and labor is to be liberally construed, so as to afford the security intended," (*Davis v Alvord, 94 U. S. 545; Mining Co. v Collins, 104 U. S. 176*)—still, since there is no "*national*" mechanics' lien law, the right of action on these indemnity bonds cannot be decided by the existence of a mechanics' lien in analogous cases.

Finally, we call the Court's attention to another strong reason for holding that persons furnishing labor or material to sub-contractors on public works are within the protection of the indemnity bonds; that is, *on the ground that such sub-contractors are "the implied" agents of the original contractors in procuring such labor and material.* In Massachusetts an act

which did not expressly give a lien to persons furnishing labor or material to sub-contractors, was held to do so on the ground of an "*implied*" agency, the Court saying:

"That the employment of a principal contractor to build a dwelling house for a definite and fixed compensation operated to authorize the latter to do all acts necessary and proper to enable him to fulfill his contract, and to complete the tenement to be erected. *It was, of course, understood between the parties that this work was not to be wholly and in every part done by the contractors with their own hands.* They were fully empowered to employ, in the execution of the contract the necessary workmen, and to cause their labor to be faithfully applied in fulfillment of its provisions. The consent of the respondents to such employment of laborers, and such application of their labor, is a necessary and inevitable implication from their contract under which the house was to be erected. The labor, therefore, which was actually performed by the petitioners, in doing the plaster and stucco work of the house, and which was a necessary part of the construction, having been rendered by virtue of an agreement with Whittemore & Currier, must be considered to have been performed with the consent of the respondents. It was done for their benefit, and under stipulations into which they had entered, by force of which they were entitled to insist that the contract should be fully performed."

Parker v Bell, 7 Gray 429;

Bates v Santa Barbara, 90 Cal. 543.

Since persons furnishing labor and material to the irresponsible and transient sub-contractors are about the only class which need the protection of the law, it follows that there is little escape from the conclusion that, if they are not protected, the substance of that Act is gone, and the remainder a mere encumbrance to swell the size of our national statute books. However, we are constrained to conclude in the language of the Supreme Court of Pennsylvania, "in the present case the defense is as bare of legal as it is of moral merit." *Philadelphia v Stewart, 195 Pa. St. 309.*

Respectfully submitted,

ALBERT W. BUDDRESS,

Attorney and Counsel for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

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THE UNITED STATES OF AMERICA, for the use and benefit of DANIEL H. HILL and HOWARD H. HILL, Co-partners, doing business under the firm name of N. D. HILL & SONS,

Plaintiff in Error,

vs.

AMERICAN SURETY COMPANY OF NEW YORK,

Defendant in Error.

No. 39.

Writ of Error to the Superior Court of the State of Washington, for King County.

BRIEF OF DEFENDANT IN ERROR.

HENRY C. WILLCOX,
Of Counsel for Defendant in Error,
100 BROADWAY,
NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1905.

THE UNITED STATES OF AMERICA, for the use and benefit of DANIEL H. HILL and HOWARD H. HILL, Co-partners, doing business under the firm name of N. D. HILL & SONS,
Plaintiff in Error,

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No. 39.

WRIT OF ERROR TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR KING COUNTY.

BRIEF OF DEFENDANT IN ERROR.

The judgment sought to be reviewed sustained a demurrer to the complaint on the ground that the latter did not state facts sufficient to constitute a cause of action. The allegations of such complaint, material to the controversy, briefly stated are: That those for whose use the action is brought in the name of the Government are co-partners; that the defendant in error, American Surety Company, is a New York corporation engaged in the surety business; that the New Jersey Foundry & Machine

Company is a New Jersey corporation; that the Richard Manufacturing Company is a Pennsylvania corporation; that on February 14, 1901, the Foundry & Machine Company contracted with the United States to construct four observation towers, and to be responsible for and pay all liabilities incurred for labor and materials in the prosecution of the work; that in accordance with the laws of the United States, the Foundry & Machine Company, as Principal, and the American Surety Company, as Surety, on February 14, 1901, executed their joint and several bond to the United States in the penal sum of $4,000.00, conditioned as follows:

> "Now, therefore, if the above bounden New Jersey Foundry & Machine Company shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements, in and by said contract agreed and covenanted by said New Jersey Foundry & Machine Company to be observed and performed according to the true intent and meaning of said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

That such bond was thereafter approved and filed, and thereupon the Foundry & Machine Company entered upon the performance of its contract. That prior to April 1, 1902, the Foundry & Machine Company subcontracted with the Richard Manufacturing Company for the performance by the latter of "certain portions of the work provided for in said contract between the Foundry & Machine Company and the United States," and thereupon the Richard Manufacturing Company entered into the performance of its said contract. That between April 3, 1902, and May

17, 1902, the Messrs. Hill, "at the special instance and request of the said Richard Manufacturing Company," scraped and painted the observation towers which the Foundry & Machine Company had agreed to construct; that the Richard Manufacturing Company agreed to pay the Messrs. Hill therefor $246.80, but that no part of such sum has been paid except $105.00, leaving due $141.80, with interest; that on August 11, 1903, the Messrs. Hill made affidavit as to their claim, as provided by statute, presented the same to the Secretary of War, procured a certified copy of the original contract and bond, and thereupon brought the action in the name of the Government for their use and benefit. That the work done by the Messrs. Hill on the observation towers was necessary in the prosecution of the work under the original contract between the Foundry & Machine Company and the Government, was accepted, and was of the reasonable value of $246.80.

It is not clear that the matter in controversy involves any question arising under the Act of Congress of August 13, 1894, under which one contracting with the Government is required to give bond conditioned for the performance of his contract, and for the payment for all labor and materials supplied to him. The action is at common law on the bond. The right of plaintiffs in error to bring the action under the statute has not been challenged; the right to recover under the bond has been denied simply because it was held that the labor and materials supplied the sub-contractor had not been supplied to the original contractor. The liability of the surety, if any, for the claim of the Messrs. Hill against the Richard Manufacturing Company must result from the bond, there being no need of any reference to the statute.

However, the surety would prefer, if possible, to have the entire controversy finally determined, because, if it be held that the contractor and its surety are liable for ma-

terials furnished to the sub-contractor, then it would be only one step further to hold them liable for materials and labor furnished to the Messrs. Hill by still more remote parties, and thus lead to results so far from what has been understood to be the liability of such a contractor and surety as to make that character of contract and suretyship impossible for a contractor or surety that expects to remain solvent.

The bond is in conformity with the statute, and by its terms obligates the Foundry & Machine Company, as principal, and the Surety Company, as surety, for the performance by such principal of its contract with the Government, and for the prompt payment by such principal to all persons supplying it with labor or materials in the prosecution of the work provided for in the contract.

It is to be observed that there is no allegation in the complaint that the Foundry & Machine Company knew of the contract between the Messrs. Hill and the Manufacturing Company, or knew that the former was furnishing the labor and materials referred to, or that the Foundry & Machine Company has not paid the Manufacturing Company in full.

The question presented is simply as to whether or not the labor or materials supplied under these circumstances by the Messrs. Hill to the sub-contractor, the Richard Manufacturing Company, "at its special instance and request," and for which "it promised and agreed to pay," constitutes the supplying by the Messrs. Hill of labor and materials to the Foundry & Machine Company, the original contractor, within the meaning of the bond, thus making such original contractor and its surety liable for such labor and materials.

We know of no case wherein the question in controversy has been by this Court decided—although there have been decisions by the lower courts on the subject supporting the contention that the supplying of labor or

materials by a third party to a sub-contractor is not supplying labor and materials to the original contractor within the meaning of the latter's bond.

In *United States for the use of Harney, et al,* vs. *Farley,* 91 Fed. Rep., 477, it appeared that Farley & Co. contracted with the United States for the construction of certain dams, giving the usual bond for performance of the contract and for the payment for all labor and material supplied them in the performance of the contract. Thereafter, George Cornish contracted with Farley & Co. to furnish certain stone needed for the work. The stone was furnished, and Farley & Co. paid Cornish, but the latter failed to pay the men employed by him in quarrying and delivering the stone, and thereupon they brought suit on the bond of Farley & Co.

In rendering judgment for the defendants, the Circuit Court for the Northern District of Iowa said:

> "In this case, therefore, the plaintiffs are not entitled to judgment in their favor, unless they fairly come within the terms of the bond itself, which, as already stated, binds Farley & Company to make payment to all persons supplying them with labor or material used in the prosecution of the work they had contracted to do. In this case, the stone was supplied to Farley & Company *by Cornish, and not by the men whom he employed to work for and under him.* Full payment having been made by Farley & Co. to Cornish for the stone by him delivered and used in the work, Farley & Company have met and performed the conditions of the bond sued on, and there is no ground shown which would justify the court in holding that Farley & Company are bound to pay the wages of all the workmen employed by Cornish. *Such a construction of the contract would result in preventing a contractor with the government from contracting in his own behalf for the delivery of any material by a third party, unless he was willing to assume the payment of all claims against the sub-contractor, which is certainty a burden which the*

statute does not impose upon those who assume contract obligations with the United States. Having paid Cornish the full amount coming to him, Farley & Company have performed all the conditions imposed on them or their sureties by the terms of the bonds sued on, and the facts proven fail to show any cause of action in favor of the plaintiffs, whence it follows that the judgment must be in favor of defendants."

In that case it appeared that the original contractor had paid the sub-contractor in full, which showed that the contractors had fully performed their obligation and furnished an equitable reason why the surety for the original contractor should not be held liable for the claims made by those who had supplied labor or material to the sub-contractor, but the reasoning by which the court reached the conclusion that such sureties were not liable was in no wise affected by the question as to whether the original contractor had or had not paid the sub-contractor. It is urged by the plaintiffs in error, at page 10 of their brief, that it is not shown that the Foundry & Machine Company has paid the Manufacturing Company for the services for which the Messrs. Hill now seek to recover. If plaintiffs in error deemed it material, and it were true, they might have alleged in their complaint that the Foundry & Machine Company had *not* paid the Richard Manufacturing Company, but they did not do so. It was not within the province of the defendant in error, when demurring to such complaint, to allege, though it were true, that the Manufacturing Company had been paid, nor was it possible for the defendant in error to make that fact appear on the record. It is a fair inference, however, from the failure of plaintiff in error to allege to the contrary, that the Foundry & Machine Company has paid the Manufacturing Company in full.

Plaintiff in error, at page 11 of its brief, argues that even if it were shown that the contractor had paid the

Richard Manufacturing Company in full it would make no difference, because the contractor should have taken an indemnity bond from the sub-contractor, to which rather startling proposition it might well be said in reply, that the Messrs. Hill should themselves have taken security from the Richard Manufacturing Company if they had any doubts about their being paid for the labor and materials which they claim they supplied. However, it is incredible that furnishing labor to the sub-contractor is furnishing it to the contractor within the meaning of the bond and thereby creating a personal claim against the contractor in favor of the laborer which can be enforced by suit on the bond and which would not be discharged even if the contractor has paid the sub-contractor in full.

In *United States, for use of the Sheridan-Shea Company* vs. *Simon*, 98 Fed. Rep., 73, it appeared that Kaufman Simon contracted with the United States to do certain dredging, giving bond in the usual form. Kaufman Simon sub-contracted with E. R. Jackson & Co. for their doing part or all of the work. The Sheridan-Shea Company furnished Jackson & Co. with certain scows for use on the work, and not being paid therefor, brought suit against Simon and his sureties. It did not appear whether Simon had or had not paid Jackson & Co.

In affirming a judgment for the defendants, the United States Circuit Court of Appeals for the Second Circuit said:

> "The corporation for whose use and benefit this action was brought alleged in the complaint that: 'On June 22, 1897, the said defendant, Kaufman 'Simon, was indebted to the said Sheridan & Shea 'Company in the sum of $3,313.99, on an account for 'goods sold and delivered to defendant, and for labor 'and materials furnished at the request of said de-'fendant in the prosecution of the work provided for 'in said contract.' Upon the trial, plaintiff wholly failed to prove these allegations. It appeared by

the undisputed evidence of the president of the Sheridan & Shea Company that he chartered three scows to a gentleman representing the firm of E. R. Jackson & Co. This gentleman was their foreman, and, after making oral arrangements with him, the terms of the contract between the two corporations were embodied in a letter which was exchanged between them and which was offered on the trial, and marked 'Exhibit A,' but, for some unaccountable reason, does not appear in the record. The contract having been made with Jackson & Co., the scows were duly furnished to them. The charges for their use were made against Jackson & Co. on the books of the Sheridan & Shea Company. The bills were sent to Jackson & Co., and efforts made to collect from them. Jackson's foreman stated to Sheridan that 'his work was for the government down in Patchogue;' that it was for that he wanted the scows. Subsequently Sheridan had a conversation with Kaufman Simon in which he told him he had made a contract with Jackson & Co., and asked him about their standing, to which he (Simon) replied that they were perfectly responsible, and also told him (Sheridan) the nature of the work at Patchogue. This certainly falls far short of proof of a supplying to Simon of labor or materials in the prosecution of the work, and counsel for the plaintiff in error wholly fails to indicate upon what theory he contends that defendant is responsible. The only suggestion contained in the brief is that the circuit judge erred in holding that 'furnishing scows 'to move materials to be used on the contract was 'not supplying labor or furnishing materials, within 'the meaning of the bond.' Careful examination of the record, however, fails to disclose any such holding. Judgment affirmed."

In *United States, for the use of Chapin-Hall Lumber Company*, vs. *Mullin et al.*, 48 Circuit Court of Appeals Reports, 677, it appeared that Thomas J. Regan contracted with the United States, giving the usual bond, with the Fidelity & Deposit Company as surety thereon; that Messrs.

Krueger, Byrne & Mullin contracted with the Fidelity & Deposit Company to indemnify it against loss by reason of its suretyship for Regan; that the Chapin-Hall Lumber Company contracted with Regan to furnish certain labor and materials; that Regan defaulted, and that such indemnitors, with the consent of all concerned, undertook the completion of Regan's contract; that the Chapin-Hall Lumber Company, after the default of the principal on the bond, continued the performance of their contract with him, supplying the necessary materials for the completion of the work. It was found and held that the Chapin-Hall Lumber Company had supplied material and labor for the prosecution of the work, under contract with Regan, and to those who by agreement of all, rightly stood in his place.

The decisions cited by the plaintiff in error under various State statutes will be found, on examination, to relate in every instance to statutes concerning mechanics' liens, and differing in terms from the Federal statute under which the bond was required to be given by the Foundry & Machine Company, and consequently the interpretation of those statutes is of no value in determining the liability of the surety on the bond of the Foundry & Machine Company given in pursuance of the Federal statute.

It is urged by the plaintiffs in error, at page 9 of their brief, that the original contract to sub-let "the entire work," and at page 10, that the original contractor cannot avoid liability on the bond by "sub-letting all of its work"; but on reference to paragraph 6 of plaintiff's complaint (Record, p. 3), it will be seen that it is there alleged that the Foundry & Machine Company sub-let to the Manufacturing Company "certain portions of the work."

The Act of Congress requiring the giving by a contractor of a bond, specifically provides that the security shall be that such contractor shall promptly make payment to

all persons supplying him with labor and materials in the prosecution of the work provided for in the contract, and the bond executed by the Foundry & Machine Company was in accord with that statute. It is manifestly just to require the contractor to pay for labor and materials supplied to it by those with whom it contracted, and to hold its surety therefor, for the contractor of course knows those with whom it has contracted, and its surety can easily obtain all needful information; but to hold the contractor liable for the payment for all labor and materials supplied to sub-contractors is manifestly unjust, because the contractor, in the nature of things, would have no knowledge of the contracts made by the sub-contractor or where or from whom the sub-contractor obtains the labor and materials, and is thus, as is its surety, without the information which it of course has concerning its own contracts. To hold the contractor liable for debts contracted by the sub-contractor would expose the contractor to collusion between the sub-contractor and those supplying him with labor or materials, and subject him to the expense and trouble of defending himself against an attack made through the medium of a suit against his surety at a great distance from his home or place of business, even though he be fortunate enough to be able to show the illegality of the claim made. In the present instance, the New Jersey Foundry & Machine Company finds itself compelled to defend a claim made, and suit brought, in the State of Washington by parties with whom it had no dealings and of the justice of whose claim against its sub-contractor it knows nothing. To hold the surety for the Foundry & Machine Company liable for the labor supplied to the sub-contractor, the Richard Manufacturing Company, by the Messrs. Hill, would be to hold the surety responsible for the debts of one with whom neither it nor the principal was in privity. It would be only one step further to declare that those who

had furnished the Messrs. Hill with labor or materials for the purposes of the contract might recover, and so on *ad infinitum*.

It is perfectly clear that when the Messrs. Hill supplied the Richard Manufacturing Company "at its special instance and request" with the labor and materials for which the Richard Manufacturing Company "promised and agreed to pay," they (the Messrs. Hill) perfectly understood that they were furnishing such labor and materials to the Manufacturing Company, and had no idea of contending that such labor and materials had been furnished to the Foundry & Machine Company, or that the Foundry & Machine Company, or its surety, should pay the debt of the Richard Manufacturing Company. They have apparently, for reasons best known to themselves, found it more desirable to attack the Foundry & Machine Company, a New Jersey corporation, in the State Courts of the State of Washington, through the medium of a suit there against the latter's surety, than to sue the Richard Manufacturing Company. If there be a just claim against the Richard Manufacturing Company, there would be no difficulty in enforcing it in Pennsylvania, the home State of that company. Perhaps there is some undisclosed reason for the Messrs. Hill not pursuing the Richard Manufacturing Company.

It is urged that the judgment of the Superior Court of the State of Washington, for King County, was right and should be affirmed.

HENRY C. WILLCOX,
Of Counsel for Defendant in Error.